SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Criminal)

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CAKAR v THE KING

[2023] SASCA 25

Judgment of the Court of Appeal

(The Honourable Justice Lovell, the Honourable Justice Doyle and the Honourable Auxiliary Justice Mazza)

16 March 2023

CRIMINAL LAW - PARTICULAR OFFENCES - PROPERTY OFFENCES - OTHER FRAUDS AND IMPOSITIONS - OBTAINING PROPERTY BY DECEPTION

CRIMINAL LAW - PROCEDURE - INFORMATION, INDICTMENT OR PRESENTMENT - AVERMENTS - UNCERTAINTY, DUPLICITY AND AMBIGUITY

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - RIGHT OF APPEAL - WHEN APPEAL LIES - ERROR OF LAW - PARTICULAR CASES INVOLVING ERROR OF LAW - FAILURE TO GIVE REASONS FOR DECISION - ADEQUACY OF REASONS

Application for permission to appeal against conviction.

The appellant was a director of a company (Living Australia) that entered into an agreement with another company (MKRE), whereby MKRE agreed to pay Living Australia 50 per cent of the net commission of each property sale referred by Living Australia to MKRE. Following entry into the agreement, the appellant discussed with the owner of MKRE a proposal to undertake a property development in the suburb of Thorngate. During 2015, the appellant commenced negotiations with property owners in Thorngate and subsequently entered into various "Option to Purchase Land" agreements, whereby Living Australia agreed to purchase the relevant property for inclusion in the land earmarked for development, and the property owner agreed to sell the property to Living Australia. These agreements were contingent upon the development proceeding.

On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (HER HONOUR JUDGE SCHAMMER) DCCRM-20-994

Applicant: ILIJAH CAKAR Counsel: MR B ARMSTRONG - Solicitor: MANGAN EY AND ASSOCIATES

Respondent: THE KING Counsel: MR D PETRACCARO SC WITH MS T WARD - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Hearing Date/s: 12/10/2022

File No/s: SCCRM-22-101

It was alleged that upon entering into the various agreements, the appellant deceived the various complainants by making false representations to them that he required funds to pay for certain upfront costs associated with the proposed development in Thorngate, and that the monies the complainants paid would be used for that purpose. At trial, the prosecution alleged that these representations caused the complainants to make various payments to the appellant, and that the appellant did not use the monies for the represented purpose, but rather used them to fund his own living expenses and lifestyle. By doing so, it was alleged that the appellant dishonestly received a benefit. The development did not proceed, and the options to purchase the residents' land were never exercised.

The appellant was convicted of two counts of deception, contrary to s 139(a) of the *Criminal Law Consolidation Act 1935* (SA), being Counts 3 and 4. The appellant was found not guilty of the remaining five counts of deception.

The trial judge found the appellant not guilty on Counts 1, 2, 5, 6 and 7 on the basis that she was not satisfied beyond reasonable doubt that the appellant had made the alleged representation as to the purpose for the monies paid by the complainants, or that the complainants paid the monies for that purpose.

The appellant appeals the decision of the trial judge on grounds that Count 4 was bad for duplicity, and that the trial judge's reasons and reasoning were inadequate with respect to Counts 3 and 4.

Held, (per the Court) allowing permission to appeal but dismissing the appeal:

1.Count 4 was not duplicitous; and

2.the trial judge's reasons and reasoning were adequate.

Crimes Act 1958 (Vic); *Criminal Law Consolidation Act 1935* (SA); *Workers Rehabilitation and Compensation Act 1986* (SA), referred to.

Boyle (a pseudonym) v The Queen [2022] SASCA 50; *Brinkworth v Dendy* (2007) 97 SASR 416; *Collins v The Queen* [2020] SASCFC 96; *Director of Public Prosecutions v Merriman* [1973] AC 584; *DL v The Queen* (2018) 266 CLR 1; *Fleming v The Queen* (1998) 197 CLR 250; *JGS v The Queen* [2020] SASCFC 48; *R v Cakar* [2022] SADC 17; *R v Giam* (1999) 104 A Crim R 416; *R v Hamzy* (1994) 74 A Crim R 341; *R v Lo Presti* (2005) 158 A Crim R 54; *R v Sexton* [2018] SASCFC 28; *Ribbon v The Queen* (2019) 134 SASR 328; *S v The Queen* (1989) 168 CLR 266; *Stanton v Abernathy (No 2)* (1990) 19 NSWLR 656; *Walsh v Tattersall* (1996) 188 CLR 77; *Wellington v Police* (2009) 105 SASR 215, considered.

CAKAR v THE KING
[2023] SASCA 25

Court of Appeal – Criminal: Lovell, Doyle JJA and Mazza AJA

1 **THE COURT:** Following a trial by judge alone, the appellant was convicted of two counts of deception,[1] being Counts 3 and 4 on the Information. The appellant was found not guilty of five other counts of deception, being Counts 1, 2, 5, 6 and 7 on the Information.[2]

2 The appellant seeks leave to appeal his convictions on grounds which contend that Count 4 was duplicitous, and that the trial judge's reasons, and reasoning, were inadequate in several respects. A judge of this Court referred the application for permission to appeal for hearing as on appeal.

3 For the reasons which follow, we do not consider that the appellant's complaints have merit. We grant permission to appeal, but dismiss the appeal.

Overview

4 The prosecution case at trial was that the appellant deceived the various complainants by making false representations to them that he required funds to pay for certain upfront costs of a proposed development in the suburb of Thorngate (the Thorngate Skywalk City Development (**the development**)), and that the monies the complainants paid would be used for that purpose. The prosecution alleged that these representations caused the complainants to make various payments to the appellant, with those payments totalling $507,000. The appellant did not, however, use the monies for the represented purpose, and instead used the monies to fund his own living expenses and lifestyle. In so doing, it was alleged the appellant dishonestly received a benefit.

5 By way of background and context to these allegations, the appellant was a director of a company named Living Australia Pty Ltd. On 12 December 2014, Living Australia entered into an agreement with Michael Kris Real Estate Pty Ltd (**MKRE**), whereby MKRE agreed to pay Living Australia 50 per cent of the net commission of each property sale referred by Living Australia to MKRE, payable upon settlement. Pursuant to that agreement, MKRE provided the appellant, in his capacity as director of Living Australia, with an office, the use of MKRE's facilities, and business cards.

6 Following entry into the agreement with MKRE, the appellant discussed with Kris Papagiannis, the co-owner of MKRE, a proposal to undertake a property development in the suburb of Thorngate. Thorngate had recently been rezoned to permit the construction of buildings of up to four storeys in height, resulting in increased interest in development in the suburb.

7 During 2015, the appellant commenced negotiations with property owners in Thorngate to enter into "Option to Purchase Land" agreements, whereby Living Australia agreed to purchase the relevant property for inclusion in the land

[1] Contrary to s 139(a) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**).
[2] The trial judge's reasons for verdict are *R v Cakar* [2022] SADC 17 (**Reasons**).

earmarked for development, and the property owner agreed to sell the property to Living Australia, for a fixed purchase price, subject to a specified expiry date. The practical effect of the option agreements was that the sale and purchase of the properties was conditional upon the development proceeding.

8 Living Australia entered into option agreements, and associated residential sales contracts, with over 20 Thorngate property owners, including the owners of the properties located at 39 Carter Street (Marios Savvas and Andrea Stylianou, the complainants on Counts 1 and 2), 43 Carter Street (Christos Komninos, the complainant on Counts 3 and 4) and 14 Main North Road (Giovanni Ragnelli, the complainant on Counts 5, 6 and 7).

9 On 7 January 2016, the appellant entered into an agreement with Warren Design, a Sydney based design company operated by Robert Warren (**the Warren agreement**). Mr Warren is a qualified architect. The Warren agreement concerned the joint creation of a development company to undertake the development in Thorngate. Pursuant to the terms of the Warren Agreement, Warren Design was appointed as the sole architects and interior designers for the development. Mr Papagiannis was appointed as Real Estate Director, and MKRE were responsible for presale marketing, the sale and lease of properties, and post development construction marketing.

10 The Warren agreement required that the appellant "submit the Entire Land Options Contracts into the Development Company upon DA Approval" and, as a director of the company, attend a permanent board meeting each month, report to the Board each time it met, and complete specific tasks allocated to him both during and after construction.

11 Significantly, the Warren agreement stated that "there will never be any call on [the appellant] to produce money for the Development".

Counts 1 and 2

12 In June 2015, the owners of 39 Carter Street, Mr Savvas and Ms Stylianou, entered into an option agreement (and associated sale agreement) with the appellant's company, with a purchase price for their property of $1,567,050.

13 The prosecution alleged that, in September 2015, the appellant told Mr Savvas and Ms Stylianou that he required $45,000 for "concept drawings" in respect of the development, and asked that they contribute $10,000 for that purpose. The appellant told Mr Savvas and Ms Stylianou that he would amend their option agreement by increasing the price that Living Australia would pay for their property. Subsequently, Mr Savvas gave the appellant $10,000 in cash, and the purchase price in the option agreement, and accompanying sales agreement, was increased to $1,718,700 (Count 1).

14 The prosecution alleged that, in January 2016, during a lunch with Mr Savvas and Ms Stylianou, the appellant told Mr Savvas that other landowners in

Thorngate were "getting skin in the game", and asked for a contribution of $200,000 to get the Thorngate development off the ground. He said that, in return, the option agreement would be amended by further increasing the purchase price the appellant would pay for 39 Carter Street. Subsequently, Mr Savvas and Ms Stylianou transferred the appellant $150,000 for development costs, and the appellant amended the option agreement and contract for sale by increasing the purchase price of their property to $3,990,000 (Count 2).

Counts 3 and 4

15 Between August and September 2015, the owner of 43 Carter Street, Mr Komninos, entered into an option agreement with the appellant's company, with a purchase price for his property of $1.2 million. There had been no discussion prior to that point that Mr Komninos would or might be required to make any financial contribution to the development.

16 In November 2015, the appellant told Mr Komninos that it looked "like they are definitely going to be doing a project" as option agreements had been signed for all the residents along Main North Road in Thorngate, and that although the area was zoned for four storeys, they were ambitious in wanting to do a six to eight storey development. The appellant asked Mr Komninos if he would be interested in contributing $25,000 to pay for the development costs so "they could do a bigger project".

17 Subsequently, Mr Komninos transferred $17,000 to the appellant. The appellant amended the option agreement by increasing the purchase price to $1,465,950 (Count 3).

18 In January 2016, the appellant rang Mr Komninos and advised that he had signed a developer, Mr Warren. The appellant then asked Mr Komninos for a further contribution to "pay for the development because now it was going to be a much more substantial development". The appellant had further conversations with Mr Komninos about the development and told him that he had done a "deal" with other property owners. Mr Komninos understood that by similarly contributing to the development costs, he would also receive an uplift in the option price for his property.

19 On 13 February 2016, Mr Komninos emailed the appellant, agreeing to contribute $70,000 to the development. Between 18 and 23 February 2016, Mr Komninos made four transfers of $10,000, before getting "cold feet". On 1 March 2016, the appellant then spoke with Mr Komninos, talking up the project and likelihood of it going ahead. Comforted by what the appellant said, Mr Komninos transferred the remaining $30,000 in three payments of $10,000 by 7 March 2016. The option agreement and associated sale contract were subsequently amended to reflect a purchase price of $3,033,000 (Count 4).

Counts 5, 6 and 7

20 On 9 October 2015, Giovanni Ragnelli, the owner of 14 Main North Road, entered into an option agreement (and associated sale agreement) for his property, with a purchase price of $3,341,000.

21 The appellant subsequently attended Mr Ragnelli's house for dinner, and told him and his wife that he needed $300,000 "to get the development going", and for "start-up costs for the design and engineering". Mr Ragnelli and his wife agreed to contribute $80,000 which was transferred in batches between 30 October 2015 and 14 January 2016. The purchase price in the option agreement and associated sale agreement was increased to $3,551,300 (Count 5).

22 In May 2016, at the suggestion of the appellant, Mr Ragnelli and his wife purchased 8 Thorngate Street, which the appellant then rented from them. The appellant told Mr Ragnelli and his wife that he would purchase both properties owned by Mr Ragnelli and his wife for $7 million. This was a "handshake" agreement and the option agreement and sale agreement were not amended.

23 On 13 May 2016, Mr Ragnelli transferred the appellant $150,000, which he understood would go towards planning costs (Count 6).

24 On 4 and 5 October 2016, Mr Ragnelli transferred the appellant further monies, totalling $30,000. He did so at the request of the appellant, who had advised him that the money was for planning and that "he was going to Government and the documentation was costing him money" (Count 7).

The use of the monies

25 The development did not proceed, and the options to purchase the residents' land were never exercised.

26 It was alleged by the prosecution that the appellant did not spend the monies paid to him by the complainants on any development costs, and indeed that there was never any obligation on him to financially contribute towards the development costs (whether pursuant to the Warren Agreement or otherwise). The only costs the appellant incurred, other than the cost of incidentals such as petrol and telephone expenses, were his own time and energy.

27 On the prosecution case, the appellant's bank statements demonstrated that the monies received from the complainants were expended on his lifestyle, including the purchase of everyday items such as groceries, food, clothing and furniture, and to fund his gambling. The appellant never returned any of the monies paid to him by the complainants.

The deception offence and its elements

28 Section 139 of the CLCA is in the following terms:

29

139 – Deception

A person who deceives another, and by doing so –

(a) dishonestly benefits him/herself or a third person; or

(b) dishonestly causes a detriment to the persons subjected to the deception or a third person,

is guilty of an offence.

30 Section 130 of the CLCA contains the following relevant definitions:

benefit means –

(a) a benefit of a proprietary nature; or

(b) a financial advantage; or

(c) a benefit of a kind that might be conferred by the exercise of a public duty in a particular way;

deceive means to engage in a deception;

deception means a misrepresentation by words or conduct and includes –

(a) a misrepresentation about a past, present or future fact or state of affairs; or

(b) a misrepresentation about the intentions of the person making the misrepresentation or another person; or

(c) a misrepresentation of law.

31 Pursuant to s 131 of the CLCA, a person's conduct is "dishonest" if the person acts dishonestly according to the standards of ordinary people, and knows that he or she is so acting.

32 Relying upon *Collins v The Queen*,[3] the trial judge distilled the elements of the s 139 deception offence in their application to the present case as follows:

(i) the accused made a representation to the relevant complainant;

[3] *Collins v The Queen* [2020] SASCFC 96 at [163] (Blue J, Peek and Stanley JJ agreeing).

(ii) the representation was false or misleading;

(iii) the accused obtained a financial advantage or benefit;

(iv) the making of the misrepresentation caused the obtaining of the financial advantage or benefit; and

(v) the obtaining of the financial advantage or benefit was dishonest.

33 There was no challenge to this distillation of the elements at trial, or on appeal.

The evidence

34 The prosecution called evidence from each of the complainants, as well as Mr Papagiannis and Mr Warren, and a detective involved in the investigation of the appellant's alleged offending. The prosecution also relied upon a number of documentary exhibits, including not only the relevant option agreements and communications with the complainants (and other residents of Thorngate), but also the banking records for the various accounts held by the appellant.

35 Several documents were tendered in the defence case. However, the appellant did not give evidence. Nor was any other oral evidence called in the defence case.

The defence case

36 The defence did not dispute the third element of the offence of deception (as distilled by the trial judge), namely that the appellant received the financial advantage alleged in each of the counts. However, the defence put the remaining elements in dispute.

37 In particular, the defence contended that the prosecution failed to prove beyond reasonable doubt that the appellant made the alleged representations to the complainants as to the purpose for which he was requesting the monies (element (i)); that the appellant did not use the monies for the stated purpose (elements (ii) and (v)); and that the (alleged) representations caused the appellant to obtain a financial advantage (element (iv)). By way of elaboration upon this last issue, the defence contended that the evidence did not exclude as a reasonable possibility that the monies advanced by the complainants were advanced in order to secure an increase in the purchase price in the relevant option agreement (and associated sale agreement), which increase was made, and that they were not advanced in response to any alleged representation by the appellant that the monies would be used for any specified purpose.

The verdicts

38 The trial judge found the appellant not guilty of Counts 1 and 2.[4] The essence of the trial judge's reasoning was that she was not satisfied beyond

[4] Reasons at [504]-[542].

reasonable doubt that the appellant specified the alleged purpose for the monies that were paid by the complainants, or that the complainants paid the monies for that purpose. The judge could not exclude, as a reasonable possibility, that the request and payment were predicated upon a loan by the complainants to the appellant, albeit in circumstances where the appellant was carrying costs associated with the development and with the complainants being keen for the development to proceed and to be involved in it.

39 The trial judge also found the appellant not guilty of Counts 5, 6 and 7.[5] Her Honour did so for similar reasons to those applicable in respect of Counts 1 and 2. Whilst again not doubting the honesty of the complainant's evidence, she was not satisfied beyond reasonable doubt that the appellant made a representation to the complainant (Mr Ragnelli) that if he advanced him the monies requested, they would be used for the relevant purpose (development costs), and that such representation caused Mr Ragnelli to advance sums he transferred to the appellant. Her Honour could not exclude as a reasonable possibility that the funds were advanced in the general context alleged, but on the basis of a request and understanding that the funds were by way of a loan to assist Mr Ragnelli. There was evidence to the effect that the appellant and Mr Ragnelli had each lent or advanced funds to assist the other during the relevant period in order to help the other out.

40 The trial judge found the appellant guilty of Counts 3 and 4, being the counts for which Mr Komninos was the complainant.

The appeal

41 As mentioned, the appellant seeks permission to appeal on grounds that raise complaints of duplicity in respect of Count 4 (ground of appeal 2), and inadequacy in the trial judge's reasons and reasoning in respect of Counts 3 and 4 (ground of appeal 4 and 5). The balance of the grounds of appeal were abandoned.

42 Consideration of the matters raised on appeal requires a detailed understanding of the evidence, the conduct of the trial, and the trial judge's reasoning in relation to Counts 3 and 4, and so it is appropriate to commence with a summary of these matters before addressing the grounds of appeal more directly.

Counts 3 and 4

43 By Count 3 and 4, the appellant was charged with two counts of deception, contrary to s 139(a) of the CLCA. The elements of that offence have been set out earlier. The particulars of Count 3 were:

> *Ilijah Cakar between the 1st day of November 2015 and the 17th day of November 2015 at Thorngate, deceived Christos Komninos by requesting money for architectural concept*

[5] Reasons at [602]-[627].

drawings for the Thorngate Skywalk City Development, on the basis that he would amend the Options to Purchase Land agreement dated 31st day of August 2015 by increasing the purchase price to $1,465,950, and by doing so dishonestly benefited himself, such benefit being money in the sum of $17,000.

44 The particulars of Count 4 were:

Ilijah Cakar between the 18th day of January 2016 and the 6th day of March 2016 at Thorngate, deceived Christos Komninos by requesting money to finance plans for the Thorngate Skywalk City Development, on the basis that he would amend the Options to Purchase Land agreement dated 31st day of August 2015 by increasing the purchase price to $3,084,000, and by doing so dishonestly benefited himself, such benefit being money in the sum of $70,000.

The judge's reasoning in relation to Counts 3 and 4

45 In considering the trial judge's reasoning in relation to Counts 3 and 4, it is necessary to understand the structure of her Honour's reasons. After addressing a number of matters which were relevant by way of introduction to her Honour's approach to all counts, her Honour then embarked upon a summary of the evidence of the complainants in relation to Counts 1 and 2 (Mr Savvas and Ms Stylianou), the complainant in relation to counts 3 and 4 (Mr Komninos), and the complainant in relation to Counts 5, 6 and 7 (Mr Ragnelli).

The evidence in relation to Counts 3 and 4

46 In the case of Counts 3 and 4, the trial judge summarised Mr Komninos' evidence over 12 pages and in quite some detail.[6] Her Honour commenced by outlining Mr Komninos' evidence as to the discussions he and his wife had with the appellant leading up to their entry into the 31 August 2015 option agreement in relation to their property, which nominated a purchase price of $1,213,200. Mr Papagiannis was present for several of those discussions, and for the execution of the option agreement, and associated sale agreement.

47 There followed a summary of Mr Komninos' evidence as to his communications with the appellant leading to the November 2015 payment of $17,000 to the appellant. These communications commenced with an early November 2015 discussion in a coffee shop during which the appellant updated Mr Komninos as to the progress of the development, but also asked him whether he would be "interested in putting up some money to pay for the development costs so they could do a bigger project". The appellant told him that if he made a contribution of $25,000, he would increase the option price by $250,000.

48 Mr Komninos said that he discussed this proposal with his wife and they agreed they would contribute to the development costs for the project in return for an uplift in their option price. They decided they would contribute $15,000 but still seek an uplift of $250,000. By email dated 11 November 2015, Mr Komninos wrote to the appellant in these terms.

6 Reasons at [222]-[292].

49 According to Mr Komninos, the appellant then rang him, and during that conversation he agreed to contribute $17,000. He transferred this amount to the appellant by way of two transfers of $8,500, on 13 and 14 November 2015 respectively. Those payments were the financial advantage alleged in Count 3.

50 On 13 November 2015, Mr Komninos (like the other option holders) received a letter from MKRE providing an update on the development, including reference to all of the properties that had been earmarked for the development having been contractually secured.

51 Shortly after Mr Komninos paid the $17,000, the appellant came to his home. Mr Komninos said that his wife was present, but that Mr Papagiannis was not. The purchase price in the option agreement and associated sale agreement was amended by hand to $1,465,950, with each of the appellant, Mr Komninos and his wife applying their signatures to those amendments.

52 The trial judge next summarised Mr Komninos' evidence as to his January 2016 dealings with the appellant. These commenced with a telephone call from the appellant on 19 January 2016, during which the appellant told Mr Komninos that he had signed a developer, Warren Design, to do the Thorngate development, but that he was looking for "a contribution again to pay for the development because now it's going to be a much more substantial development than what they had originally envisaged." Mr Komninos did not decide at that point whether he would make a further contribution.

53 Mr Komninos received a further letter from MKRE, this one dated 19 January 2016. Again, the letter was one sent to other option holders and provided an update on the development. It made reference to Living Australian having "secured a prominent Australian Developer with vast Australian and International experience to this project and an agreement was signed last week."

54 Mr Komninos said that on 28 January 2016 he returned a missed call from the appellant. They discussed the possibility of Mr Komninos making a further contribution, with Mr Komninos saying he could not afford to lose out and so needed more information, including seeing the Warren agreement. They agreed to meet, with the appellant saying that while he could not give Mr Komninos a copy of the Warren agreement, he would bring it with him so that Mr Komninos could have a look at it.

55 Mr Komninos then summarised a meeting he had at his house with the appellant on 3 February 2016. The appellant brought the Warren agreement, and Mr Komninos flicked through it. The appellant described the progress that had been made on the development, the prospect of it being bigger than originally envisaged, the likelihood of the project being approved by the Development Assessment Commission, the fact that finance had been confirmed, and the need for money to contribute to up-front development costs. Mr Komninos said that he understood that the request or proposal was that he contribute to the

development costs, in return for which he would receive an uplift in the option price for his property.

56 As the trial judge explained, Mr Komninos' evidence was that at some point after this 3 February 2016 meeting, he and his wife made a decision to participate and to contribute a sum of $70,000 "to pay for the development approval costs for the project." In return, they expected an increase in the purchase price for their property in the option agreement.

57 On 13 February 2016, Mr Komninos sent an email to the appellant which included:

> *Further to our recent meeting regarding Maria and I contributing to the upfront costs for the Thorngate development I have given it some thought.*
>
> *This is a significant amount for us and considerable risk and therefore the reward needs to be in line with this.*
>
> *Therefore for a contribution of $70,000 we seek an increase of $2 million.*
>
> *That is the final price for [our] property would be $3.5 million.*

58 Mr Komninos also gave evidence of a meeting he had with the appellant on 15 February 2016, during which he informed the appellant of the decision he and his wife had made to contribute $70,000 for the development approval costs in return for an increase in the purchase price for their property. They then discussed the potential purchase price, with the appellant suggesting that in return for a contribution of $70,000 he would amend the purchase price to $2.75 million.

59 On 17 February 2016, Mr Komninos sent a text message saying that "if you agree to $3 million plus 1.1% agent's fee for $70,000 then we have a deal. I'll be home after 6:00pm if you accept and want to sign." The appellant responded the same day: "Done see u at 6".

60 Mr Komninos rejected the suggestion in cross-examination that these messages made it plain that the deal was only about making a contribution to achieve an increase in the purchase price. He reiterated that the deal was to give the appellant money to help him get the project off the ground, and in return he would increase the purchase price in the option agreement.

61 Mr Komninos also gave evidence about meeting with the appellant on 17 February 2016. During this meeting, Mr Komninos sought, and was given, various assurances about the detail and progress of the development. Mr Komninos said that following this meeting "we were comfortable that the development was going to happen and we decided to contribute $70,000."

62 The trial judge then summarised the evidence in relation to Mr Komninos' payment of the $70,000 that he had agreed to contribute. Mr Komninos paid the $70,000 by way of seven separate EFT payments between 18 February and 7 March 2016. Significantly, for the purposes of this appeal, the evidence suggested that after the first four payments had been made, Mr Komninos began "getting cold feet". But after meeting with the appellant on 1 March 2016, he was "comforted" by what the appellant told him, and proceeded to make the next three payments. As the gap between the first four payments and the remaining three payments is central to the appellant's argument of duplicity, it is appropriate to set out in full the relevant passage from Mr Komninos' evidence:[7]

0 Did you give Mr Cakar $70,000.

A I did, yes.

1 How did you do that. Was that in cash.

A Electronic funds transfer.

2 Was that all at once.

A I did seven, $10,000 transfers.

3 Was that to do with the limit on your account.

A My account transfer limit is $10,000 per day.

4 Did you do it seven days in a row or was it over a longer period oftime.

A It was a longer period. I did four, $10,000 transactions and then I stopped and I didn't do another transaction for a week.

5 Why was that.

A I was getting cold feet. I thought it was too good to be true. I thought maybe I was getting a bit greedy, so I stopped. I stopped at $40,000.

6 Did you speak to Mr Cakar after you'd stopped.

A Yes, my recollection is I rang Ili and my recollection is 'Look, maybe we won't do $70,000. Maybe we will do 40,000. What would you give me for 40, and I don't recall what number we had and then I just went away to think about it.

7 After you thought about it, what happened.

A My recollection is that Ili rang me on 1 March and he said 'Chris, I'm next door' or on the neighbour's property 'dropping off paperwork. Can I come over' and that was on 1 March and I said 'come over' and he did.

8 Can you tell her Honour what was discussed on that occasion.

[7] T181-182.

A So he came. He said 'We are doing the development no matter what. We have 1.6 hectares. We have the corner, and he's referring to the corner of Fitzroy Terrace and Main North Road and all the front. There is nothing to worry about.' He said he will arrange for me to get a discounted unit, apartment in the new building. He said 'We will get this project over the line, no problems. Hopefully early 2017 we'll have approval'. He said '26 properties are in the project. Five left to go. It's a major project project. It will go directly to the Minister and not through the Development Assessment Commission.'

9 Did that mean anything to you at the that time. Did you know what the Development Assessment Commission was.

A I did. All State planning over a certain value has to go to the Development Assessment Commission. Special projects of State significance go directly to the Minister. They can apply to get major project status and if they do, you still go through DAC but the approval authority is the Minister.

10 You knew that at the time you had this conversation.

A Yes.

11 Continue.

A And that was it. He came out here and that's what he said to me at the time.

12 Did you send any more money or did you leave it at the 40.

A No, following that I transferred the remaining $30,000 in $10,000 lots.

13 Had you been in a sense comforted by what you'd been told.

A Yes, I was, yes.

63 Mr Komninos was cross-examined in relation to his conversation with the appellant during the gap between the fourth and fifth instalments of the $70,000. However, the cross-examination was confined to Mr Komninos' suggestion that the appellant claimed that the development had major project status. Mr Komninos acknowledged that it was possible that the appellant said they were planning to seek major project status for the development, rather than that they had already obtained that status.

64 The trial judge summarised this aspect of the evidence in the following terms:

Payment of $70,000

[280] Mr Komninos made four separate electronic fund transfers, each of $10,000 to the accused's Commonwealth NetBank Saver account ending -629. The payments were made respectively on 18 February 2016, 19 February 2016, 22 February 2016 and 23 February 2016.

Meeting – 1 March 2016.

[281] Mr Komninos said he only made the four transactions because he was "getting cold feet". He rang the accused and then on 1 March, the accused rang him and said he was next door, dropping off some paperwork. The accused came to his home and they had a further discussion, whereby the accused had told him that the development was proceeding "no matter what" and that they hoped to have approval in early 2017. He recalled the accused telling him that it now was a "major project" and that it would be going through the Development Assessment Commission.

[282] Mr Komninos agreed that he may now be mistaken as to the correct interpretation of his notes, and that they could mean that the accused had said they were planning to get major project status for the development. He also agreed that at that meeting, he did not document the terms and conditions upon which he was giving the money to the accused, nor did he request a receipt. As to the latter, he said this was because he had a record by way of the bank transfer receipt.

[283] Mr Komninos agreed that he had been comforted by what he had been told by the accused. After that meeting, he made three further separate electronic fund transfers, each of $10,000, to the accused's Commonwealth NetBank Saver account ending-629. Two of those payments were made on 3 March 2016 and the third and final payment was made on 7 March 2016.

65 Mr Komninos gave evidence that some time after the last of these payments, the appellant came to his house. He did so without Mr Papagiannis. The option and sale agreements were amended by hand to reflect an increased purchase price of $3,033,000, with the amendments initialled by the appellant, Mr Komninos and his wife.

66 The judge mentioned that Mr Komninos received a letter dated 9 May 2016 from MKRE, informing residents that the appellant was moving to 8 Thorngate Street to coordinate the development, and noting that there were a small number of residents yet to sign option agreements, causing a change to the plans. Mr Komninos subsequently attended two meetings for residents at the appellant's home at 8 Thorngate Street, one during the first half of 2016 and the other in around September 2017. Mr Komninos met Mr Warren at the first of these meetings. Mr Komninos said that he believed Mr Warren was the architect, and that the appellant was the developer.

67 Mr Komninos' evidence was that by about June 2018 he came to the conclusion that the development was not going to occur. He and his wife never received back any of the monies they had advanced the appellant.

General findings

68 After summarising the evidence of the other complainants in relation to the other counts, the trial judge then addressed several legal issues that had arisen

in relation to some of the elements of the deception offence,[8] and summarised the essence of the prosecution and defence cases.[9] The trial judge then made a number of findings relevant across the various counts.[10]

69 The judge set out her findings as to the appellant's early involvement in the proposed development, and in arranging the various option agreements. The judge accepted the evidence of the various complainants as to their early dealings with the appellant in this regard. In the case of Mr Komninos, this extended to accepting his evidence as to the November 2015 coffee shop meeting that he had with the appellant.

70 The judge made findings that each of the complainants made the payments or contributions alleged by the prosecution, and that amendments were then made to the purchase prices in their various option agreements and associated sale agreements.

71 The judge then made some findings about the involvement of Mr Papagiannis and MKRE.[11] Her Honour held that although Mr Papagiannis was present on the occasion that each complainant initially executed their respective option and sale agreements, he was not present on any occasion when those agreements were amended to reflect the subsequent arrangements entered into directly by the complainants with the appellant. The judge went on to accept the evidence of Mr Papagiannis to the effect that MKRE had no involvement (i) in preparing any appropriate addendum agreements to reflect those changes; (ii) in any negotiations with any of the residents about them making financial contributions to the development; and (iii) in the process of getting approvals, architectural drawings, engineering assessments or anything like that with respect to the development.

72 The judge accepted that MKRE's role related to the execution of the relevant contracts, attending meetings, updating residents as to the development and verifying sale values for the apartments. Her Honour also found that MKRE, through Mr Papagiannis, had been in regular communication with Mr Warren from late 2015 until at least October 2016; and that Mr Papagiannis played a role in facilitating communications between the appellant and Mr Warren in relation to the development.

73 The judge also accepted the evidence of Mr Papagiannis that the work undertaken by him on behalf of MKRE was undertaken without any payment to him or MKRE.

74 The trial judge then moved to the involvement of Mr Warren,[12] finding that there was no doubt that the involvement of Mr Warren and Warren Design in the

8 Reasons at [358]-[378].
9 Reasons at [390]-[406].
10 Reasons at [407]-[451].
11 Reasons at [425]-[430].
12 Reasons at [431]-[440].

development was a significant step insofar as it generated optimism in the complainants as to the likelihood of the development proceeding.

75 Having mentioned the earlier discussions with Mr Warren, the judge addressed the appellant's entry into the Warren agreement on 7 January 2016. After noting that the agreement appointed Warren Design as "sole architects and interior designers" for the development, the judge accepted Mr Warren's evidence, consistent with the terms of the agreement, as to absence of any obligation on the part of the appellant to make any payments in respect of architectural plans and the like:

> *[434] ... I accept the evidence of Mr Warren, consistent with the terms of the Warren Agreement, that pursuant to that agreement, Warren Design and the accused each agreed to cover their own personal costs associated with the development until the development was approved, at which time they would each be entitled to payment of certain monies.*

> *[435] As such, insofar as there was any necessity for architectural concept plans to be drafted, they were to be drafted by Warren Design, and there was no requirement for the accused to make any payment with respect to the same. These were costs borne by Warren Design.*

76 The trial judge then addressed the provisions of the Warren agreement relating to the payment of fees. The judge noted that the agreement provided that the fees payable to Warren Design included not only their own costs, but also "all Consultant Fees involved with the Development and beyond. This covers all Consultants involved in the DA, CC, and Building Site Administration." The agreement listed the numerous consultants intended to be covered in the 12 per cent Architect's Fee to be paid to Warren Design upon development approval being achieved, including engineers, surveyors, town planners, building certifiers and "other consultants mandatory from DAC & authorities". The agreement also listed various fees to be paid by the Development Company, including DAC fees, Adelaide council fees, rezoning fees, service authority fees, and fees payable to accountants, lawyers and tourist management consultants.

77 The judge then set out the following provision (clause 2F) from the Warren agreement in relation to the appellant's responsibility to pay costs:

> *[438] ... there will never be any call on Ilija Cakar to produce money for the Development. Ilija Cakar is responsible for monies spent to date on any Professional Service completed to this date.*

78 The judge explained that it was thus apparent that the appellant was not required to produce money for the development. While he was responsible for monies spent on any "Professional Services completed" to the date of the agreement, namely 7 January 2016, there was no obligation on the appellant to pay for any such services after that date. The judge reasoned that, although the

term "Professional Services" was not defined, having regard to the wording of the agreement, it was to be understood as a reference to the services listed as required to be paid either by Warren Design (as part of their Architect's Fee) or by the Development Company.

79 The judge also observed that the payments that were the subject of Counts 2, 4, 6 and 7 were all made after execution of the Warren agreement.[13]

80 Next, the judge summarised the appellant's role in the development,[14] explaining that it involved liaising with Thorngate residents and negotiating with them with a view to acquiring their properties for inclusion in the development. Ancillary to that role, he also prepared the option agreements and communicated with MKRE to prepare the sales contracts and sales agency agreements. He prepared spreadsheets confirming which properties had been secured and which remained outstanding. He kept residents informed of the status of the development by meeting with them and discussing it with them. The judge added that the appellant attended meetings with Mr Papagiannis and Mr Warren from time to time, and regularly communicated with them both. He also attended a meeting about the development with the Mayor of the City of Prospect, and may have met with a politician.

81 However, the judge concluded that the majority of the "hands-on" work associated with the development (for example, liaising with prospective financiers, calculating likely profitability, determining land values and the like) was all undertaken by Mr Warren and Mr Papagiannis, and not the appellant.

82 The judge stated and explained her conclusion to the effect that, other than his time and some minor out of pocket costs, the appellant did not incur (or have any responsibility for) any costs associated with the development:

> *[447] After carefully considering the evidence, I am satisfied that the only costs the accused in fact incurred with respect to the development were those of and incidental to his role with respect to the development, namely, to secure the purchase of the properties to be included in the development. Those costs were, primarily, the cost of his time in identifying the properties, negotiating with the property owners and drafting the option agreements. In addition, one would expect ancillary out of pocket expenses to be incurred, such as petrol/travel costs to visit various residents for the purposes of negotiation (albeit these must have been modest given their proximity to the MKRE office and to 8 Thorngate Street) and any costs incurred to entertain residents.*
>
> *[448] There was no requirement for the accused to pay rent to MKRE for the use of its office space and facilities at their Grange Road premises. MKRE arranged for the accused's business cards to be prepared.*

[13] Reasons at [441].
[14] Reasons at [442]-[451].

[449] The accused was not required to make any payments to MKRE for their role in preparing the relevant sale contracts nor Mr Papagiannis' time spent in attending the various property owners' premises to execute the relevant documentation. The letters sent to residents advising them of the status of the development were all generated by MKRE and signed by Mr Papagiannis and Mr Georgiadis of MKRE, not the accused, meaning these were costs borne by MKRE.

[450] There was no requirement for the accused to meet any of the costs incurred by Mr Warren, nor those of any of the consultants as outlined in the Warren Agreement at paragraph 13. The Development Company, not the accused, was responsible for paying various fees associated with the development as incurred with the DAC, Council or other authorities.

[451] I am satisfied and I find that from at least 7 January 2016, the accused had no responsibility for payment of architectural fees, engineering fees, surveyors' fees, soil report fees, engineering report fees or conveyancing fees.

Findings as to the use of the complainants' monies

83 The judge next embarked upon a detailed analysis of the appellant's banking records, making findings as to the use made by the appellant of the monies paid to him by the complainants.[15]

84 Before setting out the detail of that analysis, the judge summarised the conclusions she was able to draw from the analysis of the banking records:

[453] Having done so, I am satisfied, beyond reasonable doubt, that the accused did not, in fact, use any of the monies transferred to him by the complainants, that is the monies the subject of counts 2-7[16], to pay for architectural fees (or architectural concept drawings or plans), engineering fees, surveyors' fees, soil reports, engineering report fees, conveyancing fees or other similar costs associated with the development.

85 The judge then set out the detail of her analysis of the banking records. This included the use made of the funds transferred to the appellant by the complainant on Counts 3[17] and 4,[18] Mr Komninos. Her Honour identified that those funds were used to meet a range of personal expenses, with none of them referrable to development costs of the type mentioned above.

Findings and conclusions in relation to Count 3

86 The trial judge then set out her additional findings, and conclusions, in respect of each of the individual counts. Her Honour dealt separately with Counts 3[19] and 4.[20]

15 Reasons at [452]-[503].
16 Noting that the payment the subject of count 1 was made with cash, and it use was not able to be traced.
17 Reasons at [464]-[471].
18 Reasons at [479]-[487].
19 Reasons at [543]-[568].
20 Reasons at [569]-[601].

87 Addressing the first element of the Count 3 offence – that the appellant made the alleged representation – the judge noted that the prosecution relied upon the evidence of Mr Komninos. The judge said that Mr Komninos was an impressive witness. He gave his evidence in a calm and considered manner, without embellishment. He made concessions as and when appropriate. He was clearly an honest witness.

88 The judge then set out a summary of Mr Komninos' evidence as to the representations made to him leading up to his November 2015 payments, concluding that she was satisfied beyond reasonable doubt that the appellant made the relevant representation, and that it was this representation that caused Mr Komninos to pay $17,000, by way of two transfers of $8,500 each.[21] In this way, the accused obtained a financial advantage or benefit of $17,000.[22]

89 Referring back to her earlier findings as to the use made of these funds, the judge found that the funds were not used to pay for architectural drawings, or indeed any other development costs, and hence that the appellant's representation as to the use of the funds was false or misleading:

> *[563] I refer to my discussion at paragraphs 464 to 471 as to the use of the $17,000 transferred to the accused by Mr Komninos. The funds provided can be traced as outlined therein. Those funds were not transferred to any other account held by the accused from which he could have theoretically made payment of development related expenses.*
>
> *[564] Although some of the funds were withdrawn in cash by the accused, I refer to my findings as set forth in paragraphs 435, 438, 439 and 447 to 450 as to the accused's role in the development and the resulting expenses thus incurred by him in performing that role. Even if there was any responsibility for the accused to pay for project development costs, including architectural drawings, which there was not, I exclude as a reasonable possibility, that cash withdrawn by the accused was used to make such payments. This was a large commercial development. Any such expenses incurred and paid for would, by necessity, for taxation purposes, be properly documented and traceable.*
>
> *[565] I am satisfied beyond reasonable doubt that the accused did not use any of the $17,000 transferred to him by Mr Komninos to fund architectural drawings (or engineering drawings or studies for the development), as represented by the accused to Mr Komninos. Rather, I am satisfied beyond reasonable doubt that the accused used the $17,000 to fund his own lifestyle.*
>
> *[566] I am satisfied beyond reasonable doubt that the accused's representation was false or misleading, in that he did not need money for development costs, including architectural concept drawings.*

90 Finally, the judge found that the appellant's conduct was dishonest:

[21] Reasons at [550]-[561].
[22] Reasons at [562].

> *[567] Further, I am satisfied beyond reasonable doubt that the accused's conduct, in obtaining the financial advantage, was dishonest. I am satisfied that at the time he made the representation, the accused knew the money would not be used by him to fund development costs, including architectural drawings, as he had no obligation to fund such costs. He knew the representation was false and that in fact he needed the money to pay for his living expenses. The fact Mr Papagiannis was not present at the time the option agreement was amended, nor informed of the same in order to draft an appropriate addendum to the sale contract, demonstrates that the accused did not wish his conduct to be known by Mr Papagiannis, thus being circumstantial evidence supporting the finding of dishonesty.*

91 The judge found the appellant guilty of Count 3.

Findings and conclusions in relation to Count 4

92 Having set out the allegation the subject of Count 4, the trial judge observed that the prosecution case in respect of this count again relied upon the evidence of Mr Komninos.

93 The judge accepted the evidence of Mr Komninos, supported by the documentary evidence, and found beyond reasonable doubt, that he made seven transfers of $10,000 each to the accused's bank account between 18 February and 7 March 2016. The judge was satisfied beyond reasonable doubt that the appellant thereby obtained a financial advantage of $70,000.[23]

94 The judge then referred to Mr Komninos' evidence as to the "several different occasions when he either met with or spoke to the accused before transferring him any part of the $70,000, to explain why he transferred this money to the accused".[24] The judge went on to refer to Mr Komninos' evidence as to his discussions with the appellant on 19 January, 28 January, 3 February and 17 February – summarised earlier in these reasons – and accepted his evidence in relation to these conversations, and in particular his linking of the contributions to their use for development costs.[25]

95 The judge referred to the gap between the fourth and fifth payments of $10,000, concluding that the delay was irrelevant:

> *[587] There was nine days between the fourth transfer of $10,000 to the accused on 23 February 2016 and the fifth transfer of $10,000 made on 3 March 2016. I accept the evidence of Mr Komninos that after making the fourth transfer, he was getting cold feet, but that he was comforted after speaking with the accused [on 1 March 2016] and being reassured the development was proceeding. The delay in the payment of the final $30,000 is irrelevant, in my view, in determining whether the alleged representation was made by the accused.*

96 The judge set out her conclusions in relation to the representation made by the appellant:

[23] Reasons at [571].
[24] Reasons at [572].
[25] Reasons at [573]-[586].

[588] I have carefully considered all of Mr Komninos' evidence. I am satisfied that in his various discussions with Mr Komninos between 19 January 2016 and 1 March 2016, the accused represented to Mr Komninos that the development was going to be a much more substantial development, which would involve significant upfront costs, including costs to change the design to suit the Development Approval Commission.

[589] I am further satisfied, both from the evidence given by Mr Komninos and the contents of his email to the accused dated 13 February 2016, that the accused asked Mr Komninos to contribute a sum towards the 'upfront costs' of the development, in exchange for an increase in the Contract Amount on the option agreement.

[590] I am satisfied beyond reasonable doubt that the accused made a representation to Mr Komninos between 18 January 2016 and 6 March 2016 [being the date range in the charge as particularised in the Information], that he needed money to fund the upfront costs of the development, with such costs expressly stated to include the costs incurred to change the design, having regard to the fact the development was going to be substantially larger than originally intended, and/or to satisfy the Development Approval Commission, and that if Mr Komninos (and his wife) paid him $70,000 for such costs, he would increase the Contract Amount on the option agreement to $3M.

[591] I am satisfied that such representation therefore encapsulates that as particularised in the Information, namely that the accused needed money 'to finance plans' for the development such that the accused has had fair notice of the charge against him in count 4.

[592] I accept the evidence of Mr Komninos wherein he rejected the proposition put to him in cross-examination that the reason he paid the accused $70,000 was simply to achieve an increase in the Contract Amount.

[593] I accept the evidence of Mr Komninos that he transferred the sum of $70,000 to the accused in order to help him fund the development costs for what was going to be a much larger project, with such costs including architectural drawings, plans and studies. I am therefore satisfied beyond reasonable doubt that the making of the representation by the accused was a substantial cause of the subsequent transfer by Mr Komninos of the sum of $70,000 to the accused, and thus that the accused's representation caused the accused to obtain a financial advantage (or benefit) in the sum of $70,000.

97 For reasons the equivalent of those set out in relation to Count 3, the judge concluded beyond reasonable doubt that the $70,000 transferred by Mr Komninos to the appellant was not required to be used, and was not in fact used, by the appellant towards development costs.[26]

[26] Reasons at [594]-[598].

98 The judge also concluded that the appellant's conduct was dishonest, once again referring in this respect to the fact that Mr Papagiannis was not present or involved in amending the option and sale agreements:

> *[599] Further, I am satisfied beyond reasonable doubt that the accused's conduct, in obtaining the financial advantage, was dishonest. I am satisfied that at the time he made the representation, the accused knew the money would not be used by him to fund upfront costs for the development, and specifically plans, as he had no obligation to fund such costs. He knew the representation was false and that in fact he needed money to pay for his living expenses.*
>
> *[600] Again, the fact that Mr Papagiannis was not present at the time the option agreement was further amended and increased to $3,033,000, nor was he informed in order to draft an appropriate addendum to the sale contract, demonstrates that the accused did not wish his conduct to be known by Mr Papagiannis, thus being circumstantial evidence supporting the finding of dishonesty.*

99 The judge found the appellant guilty of count 4.

Duplicity

100 The appellant argues that Count 4 is bad for duplicity.[27] Whilst acknowledging that multiple payments may constitute a single offence of deception under s 139 of the CLCA, the appellant contends that the evidence in support of Count 4 revealed a substantial gap between the first four payments of $10,000 each, and the remaining three payments of $10,000 each. The appellant contends that, properly analysed, the prosecution case in respect of Count 4 involved an allegation of two tranches of $40,000 and $30,000 respectively, and hence two separate offences of deception.

101 The rule against duplicity is that no one count on an information should charge the defendant with having committed more than one offence.

102 A count on an information may be bad for duplicity where it expressly charges more than one offence, and hence is duplicitous on its face. A complaint of duplicity of this type – patent duplicity – is a matter of form, and does not depend upon any analysis of the evidence to be led.[28] However, there will be some cases where the duplicity is latent, and only emerges once the evidence has been presented and it becomes clear how the prosecution case is being put.[29]

103 As has often been remarked, whilst easy to state, the rule against duplicity may be hard to apply in a given case.

104 In applying the rule, it is important to bear in mind that it is grounded in a basic consideration of fairness, namely that an accused should know the case he

[27] Appeal Ground 2.
[28] *Walsh v Tattersall* (1996) 188 CLR 77 at 84 (Dawson and Toohey JJ).
[29] *Walsh v Tattersall* (1996) 188 CLR 77 at 109 (Kirby J); *Brinkworth v Dendy* (2007) 97 SASR 416 at [48]-[49] (Doyle CJ, Anderson J agreeing).

has to meet.[30] Looked at another way, the rule is one designed to avoid uncertainty in the basis for a verdict.[31]

105 However, the rule must be applied in a practical, rather than strictly analytical, manner.[32] There is no verbal formula of precise application which constitutes an easy guide to whether the rule against duplicity has been infringed.[33]

106 The approach to be taken involves having regard to several indicia of whether, in substance, the relevant count alleges a single offence or multiple offences.[34] Particularly in cases of latent duplicity, the issue is one of fact and degree that involves having regard to not only the nature of the offence charged (particularly the *actus reus*), but also the way in which the prosecution case is formulated and conducted, and the nature of the acts relied upon and the issues to which they relate. Where the prosecution case relies upon more than one act to make out the *actus reus*, or an element of the offence, it will be relevant to have regard to the similarity or connection between those acts in terms of their timing, location and circumstance, and the extent to which they give rise to different legal or factual issues in the case. In some cases, it may be appropriate for the prosecution to rely upon multiple acts – particularly where they may be described as involving one activity, transaction or course of conduct[35] – as constituting the *actus reus* of a single offence. In other cases, that may not be appropriate.

107 In attempting to give some practical content to these general principles it is useful to consider, and compare, their application in three cases involving offences broadly comparable to the offence in the case at bar, namely *Walsh v Tattersall*,[36] *R v Giam*[37] and *R v Lo Presti*.[38]

108 In *Walsh v Tattersall*, an employee was charged under s 120(1)(a) of the *Workers Rehabilitation and Compensation Act 1986* (SA) with obtaining by dishonest means "payments or benefits" made under the Act. Section 120(1) of the Act provided: "A person who – (a) obtains by dishonest means any payment

30 *Walsh v Tattersall* (1996) 188 CLR 77 at 84 (Dawson and Toohey JJ) and at 92-93, 104-106 (Kirby J); *S v The Queen* (1989) 168 CLR 266 at 284-285 (Gaudron and McHugh JJ); *Brinkworth v Dendy* (2007) 97 SASR 416 at [55] (Debelle J).

31 *Wellington v Police* (2009) 105 SASR 215 at [45] (Kourakis J); *S v The Queen* (1989) 168 CLR 266 at 284-285 (Gaudron and McHugh JJ); *R v Giam* (1999) 104 A Crim R 416 at [24] (Spigelman CJ, Abadee and Adams JJ agreeing).

32 *Walsh v Tattersall* (1996) 188 CLR 77 at 84 (Dawson and Toohey JJ) and at 92-93, 104-106 (Kirby J); *Director of Public Prosecutions v Merriman* [1973] AC 584 at 607 (Lord Diplock); *Brinkworth v Dendy* (2007) 97 SASR 416 at [55] (Debelle J).

33 *Stanton v Abernathy (No 2)* (1990) 19 NSWLR 656 at 666 (Gleeson CJ); *Walsh v Tattersall* (1996) 188 CLR 77 at 108 (Kirby J); *Brinkworth v Dendy* (2007) 97 SASR 416 at [26] (Doyle CJ, Anderson J agreeing), [55] (Debelle J).

34 *Walsh v Tattersall* (1996) 188 CLR 77 at 107-109 (Kirby J); *Wellington v Police* (2009) 105 SASR 215 at [11] (Kourakis J).

35 *R v Hamzy* (1994) 74 A Crim R 341 at 349 (Hunt CJ at CL, Abadee and Simpson JJ agreeing).

36 *Walsh v Tattersall* (1996) 188 CLR 77.

37 *R v Giam* (1999) 104 A Crim R 416.

38 *R v Lo Presti* (2005) 158 A Crim R 54.

or other benefit under this Act … is guilty of an offence." The relevant count related to payments made to the employee between October 1992 and October 1993, and alleged that he had dishonestly pretended to be suffering the effects of anxiety and depression arising from criminal charges brought against him by his employer.

109 An argument of duplicity was rejected by the Full Court of this Court. However, a majority of the High Court (Gaudron, Gummow and Kirby JJ, Dawson and Toohey JJ dissenting) allowed the appeal.

110 Kirby J did so on the grounds that the relevant count was bad for duplicity. His Honour reasoned that the purpose of s 120 was to create a separate offence for each payment or benefit, and that the payments or benefits relied upon by the prosecution were not so closely related in time, or otherwise, to amount to one activity. Indeed, separate attention to the existence of the alleged dishonesty of the appellant at the different times of the various payments and benefits may have produced a different result.[39]

111 Gaudron and Gummow JJ allowed the appeal on the basis that s 120(1) contemplated that each payment or benefit would constitute a separate offence. Whilst their Honours expressed the difficulty with the impugned count in terms that it purported to charge an offence in terms not contemplated by s 120(1), rather than duplicity, their construction of the offence provision accorded with that of Kirby J.[40]

112 Dawson and Toohey JJ dissented on the basis that the case against the appellant was that, in the period specified (between October 1992 and October 1993), he engaged in a course of conduct which amounted to one compendious false pretence of incapacity for work. That is, the appellant dishonestly put forward to his employer a case of incapacity for work, and dishonestly maintained that case by presenting medical certificates and receiving payments under the Act.[41] In their Honour's view, s 120(1) could accommodate a rolled-up allegation of this nature. As their Honours explained:[42]

> *In the present case, the appellant could be in no doubt as to the case to be presented against him which was that he misrepresented that he was incapacitated for work and maintained that misrepresentation during the period specified in the complaint, obtaining thereby various payments under the Act. As Prior J observed [in the court below], what was involved was one activity of a continuing kind. In that situation it is legitimate to bring a single charge.*[43]

39 *Walsh v Tattersall* (1996) 188 CLR 77 at 112 (Kirby J).
40 *Walsh v Tattersall* (1996) 188 CLR 77 at 89, 91 (Gaudron and GummowJJ).
41 *Walsh v Tattersall* (1996) 188 CLR 77 at 83 (Dawson and Toohey JJ).
42 *Walsh v Tattersall* (1996) 188 CLR 77 at 86 (Dawson and Toohey JJ).
43 *Director of Public Prosecutions v Merriman* [1973] AC 584 at 593 (Lord Morris).

113 In *R v Giam,*[44] the accused was charged with six counts alleging offences under s 178BB of the *Crimes Act 1900* (NSW). That section provided:

> *Whosoever with intent to obtain for himself or herself or any other person any money or valuable thing or any financial advantage of any kind whatsoever, makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) which he or she knows to be false or misleading in a material particular or which is false or misleading in a material particular and is made with reckless disregard to whether it is true or misleading in a material particular is liable to imprisonment for five years.*

114 Each of the six counts with which the accused was charged alleged that the accused had made two false statements, each of which was different in substance from the other. The New South Wales Court of Appeal held that each false statement constituted a separate offence, with the result that the charges were duplicitous. The Court rejected the contention that "statement" in s 178BB could be understood as encompassing multiple statements in circumstances where each was not only separately made, but also different in substance.[45]

115 In *R v Lo Presti*,[46] the accused was charged with three counts of obtaining a financial advantage by deception, contrary to s 82(1) of the *Crimes Act 1958* (Vic). Each count alleged that the appellant obtained a specified financial advantage by a series of false representations (as to his name, his qualifications, his insurance, the use to which monies that had been advanced would be used, and the security in respect of those monies). Relying upon *R v Giam*, the appellant argued that all three counts were bad for (patent) duplicity because they each alleged a number of false statements and hence a number of different offences.

116 In distinguishing *R v Giam*, Buchanan JA (with whom Ormiston and Ashley JA agreed) noted the different terms of the s 82(1) offence. Under that provision:

> *A person who by deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).*

117 "Deception" was defined in general terms to mean "any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person". Critically, Buchanan JA was satisfied that "deception" for the purposes of s 82(1) was apt to cover a course of conduct:[47]

> *In my opinion s 82(1) fastens upon obtaining a financial advantage as the gist of the offence where the advantage is obtained by deception. Once a financial advantage is*

[44] *R v Giam* (1999) 104 A Crim R 416.
[45] *R v Giam* (1999) 104 A Crim R 416 at [30] (Spigelman CJ, Abadee and Adams JJ agreeing).
[46] *R v Lo Presti* (2005) 158 A Crim R 54.
[47] *R v Lo Presti* (2005) 158 A Crim R 54 at [25] (Buchanan JA, Ormiston and Ashley JJA agreeing).

> *obtained by the proscribed means, the offence is complete. The deception by which that result is achieved may be constituted by one or a number of false statements. The word "deception" is apt to cover a course of conduct.*

118 Buchanan JA explained that s 82(1) was similar to the offence provision in *Walsh v Tattersall,* noting Gaudron and Gummow JJ's reference in that case to the offence being complete upon each payment or benefit being obtained.[48] His Honour said that the offence provision in *R v Giam,* on the other hand, placed the false statement at the forefront by providing that making a statement, knowing it to be false (or being reckless as to its falsity) was an offence if it was made with intent to obtain money, a valuable thing or financial advantage.[49]

119 Returning to the present case, the appellant focused his contention of duplicity upon an analysis of the elements of the offence of deception under s 139 of the CLCA. We have set out the five elements earlier in these reasons. The appellant focused upon the third element, namely that the accused made a financial advantage (or benefit). He pointed out that while the advantage must be financial in nature, it need not be proved in a specific amount.[50] However, he emphasised that identification of the relevant financial advantage was critical both because the receipt or obtaining of that financial advantage marked the completion of the offence, and because it fixed the point at which the issues of causation (the fourth element) and dishonesty (the fifth element) fell to be addressed. He contended that the offence was complete upon the receipt of each payment.

120 At one level, the appellant's argument proves too much. Taken to its logical extreme, it would suggest that because Count 3 involved two separate payments (of $8,500 each), it involved two offences; and that because Count 4 involved seven separate payments (of $10,000 each), it involved seven offences. However, the appellant quite properly acknowledged that this would be artificial. He accepted that the notion of a financial advantage for the purposes of s 139 may encompass multiple payments where, in substance, they involve no more than several transfers intended to give effect to the one payment. That would ordinarily be the case where, as here, a person who has a daily transfer limit on their bank account decides to make an agreed payment through several smaller transfers all within a short period of time, and without there being any relevant change in circumstances. The appellant accepted that this approach would be consistent with the terms of s 139 of the CLCA, and the approach taken by the Courts in *Walsh v Tattersall*, *R v Giam* and *R v Lo Presti*.

121 However, the appellant contends that the allegation the subject of Count 4 is different because there was a significant gap between the two tranches of payments (the first to fourth instalments, and the fifth to seventh instalments) said to constitute the $70,000 financial advantage relied upon by the prosecution.

[48] *R v Lo Presti* (2005) 158 A Crim R 54 at [26] (Buchanan JA, Ormiston and Ashley JJA agreeing); *Walsh v Tattersall* (1996) 188 CLR 77 at 89 (Gaudron and Gummow JJ).
[49] *R v Lo Presti* (2005) 158 A Crim R 54 at [26] (Buchanan JA, Ormiston and Ashley JJA agreeing).
[50] *Collins v The Queen* [2020] SASCFC 96 at [110] (Blue J, Peek and Stanley JJ agreeing).

The appellant argues that not only was the gap significant in time – more than seven days – but the gap was also significant in the sense that it was a period during which the complainant, Mr Komninos, experienced "cold feet" and had to be reassured or comforted by the appellant during a conversation that occurred on 1 March 2016 before he proceeded with the second tranche of payments. The appellant argued that during the gap there were fresh representations, indeed fresh acts of deception, that affected the analysis of the issues of causation and dishonesty. As such, the prosecution case in relation to Count 4 involved two separate offences, one in respect of each of the two tranches of payments.

122 Understood in this way, it is apparent that the appellant's argument is one of latent duplicity rather than patent duplicity.

123 As the appellant rightly acknowledged, there is nothing in the terms or nature of the s 139 deception offence that would prevent the financial advantage or benefit being constituted by multiple payments or transfers in the circumstances that occurred in respect of Counts 3 and 4. Whether or not Count 4 was duplicitous in the particular circumstances that ensued requires consideration of the significance of the gap that occurred between the two tranches of payments constituting Count 4. It involves an issue of fact and degree, requiring a consideration of the various indicia, outlined earlier, as to whether Count 4 involved an allegation of a single offence or multiple offences. In particular, it requires consideration of the similarity or connection between the payments constituting the first and second tranches, and the extent to which the gap between those tranches (and the events that occurred during that gap) gave rise to different factual or legal issues in respect of the two tranches. It requires consideration of these matters in the context of the way the prosecution case was alleged and run, but also in light of how the evidence emerged and the issues raised on the defence case.

124 The prosecution case in relation to Count 4 was alleged and run on the basis that the appellant made a series of statements during January and February 2016, the accumulation of which gave rise to a single representation to the effect that the monies paid to the appellant would be used for the purpose of meeting development costs; and that this representation caused Mr Komninos to agree to contribute, and hence caused the appellant to obtain, a single financial advantage of $70,000.

125 This case was consistent with the evidence, with Mr Komninos giving evidence to the effect that he had decided and agreed to pay the appellant $70,000 prior to making the first payment. The payment of this agreed sum was broken down into $10,000 payments because this was the daily transfer limit on Mr Komninos' bank account.

126 Turning to the significance of the gap that followed the first tranche of four payments, Mr Komninos' evidence – set out in full earlier in these reasons – was to the effect that the gap occurred because he began to experience "cold

feet", that he was then "comforted" by his 1 March 2016 conversation with the appellant, and that he subsequently resumed making the balance of the payments necessary to complete his $70,000 payment.

127 The gap in timing and the 1 March 2016 conversation were potentially relevant considerations in addressing the elements of the Count 4 deception offence. However, we do not think they took on the significance that the appellant contends. We do not think the conversation involved any fresh representation or deception. Mr Kominos did not suggest that there was anything further said to him in relation to the use that would be made of the monies he had agreed to pay. On the evidence, and indeed the findings of the trial judge, the representations made by the appellant during January and February 2016, to the effect that the monies would be used to pay development costs, continued to operate on Mr Komninos' mind. The "comfort" that Mr Komninos received related to the prospects of the development going ahead. Whilst the appellant spoke optimistically about the prospects of the development going ahead, it is not as though what he said on this occasion differed in any significant way from what he had been telling Mr Komninos throughout their conversations in January and February 2016. What was said on 1 March 2016 was but a continuation, and reinforcement, of what he had said previously.

128 We acknowledge that, on Mr Komninos' evidence, the appellant included reference to the possibility of Mr Komninos obtaining a discounted unit or apartment in the new development. However, we do not think this is a matter of any great significance. Mr Komninos did not suggest that the reference to the possibility of a discounted unit or apartment was of any significance in his decision to proceed with making the balance of the payments. It was, in any event, a matter that Mr Komninos said had been raised previously in his conversations with the appellant (for example, in their 3 February 2016 conversation). The reference to the possibility of a discounted unit or apartment was not a matter pursued in cross-examination, or otherwise relied upon in the defence case.

129 Properly understood, the gap that followed the first tranche of payments, and the reassurance that Mr Komninos received during the 1 March 2016 conversation, did not materially affect the issues that arose in relation to Count 4. As explained earlier, the cross-examination in relation to the 1 March 2016 conversation was confined to an aspect of what the appellant had said in relation to seeking major project status. There was no cross-examination to suggest that what Mr Komninos had previously been told about the use to be made of the agreed $70,000 was no longer operating on Mr Komninos' mind, or that he had been told something new or different during the 1 March 2016 conversation. In other words, there was no attempt in the defence case, through cross-examination or submissions, to suggest that the gap in the payments, or the conversation that occurred on 1 March 2016, affected the causation analysis. Nor was there any attempt in the defence case to suggest that the gap in the payments, or the conversation that occurred on 1 March 2016, affected the analysis of the

appellant's dishonesty. The prosecution and defence cases both proceeded on the basis that the causation and dishonesty issues fell to be addressed in the same way in respect of all seven payments. The issues fell to be analysed in terms of whether the $70,000 paid to the appellant constituted a financial advantage caused by the representation he made as to the use to be made of those monies, and whether his conduct in obtaining this financial advantage was dishonest. As a matter of substance, the prosecution case and the evidence was to the effect that the payments totalling $70,000 represented one financial advantage; that the payments involved one continuing criminal transaction, activity or course of conduct.

130 For completeness, we mention that the appellant did not make any complaint of duplicity at trial. He did not object to the terms of Count 4 on the Information. He did not do so at the outset of the trial. But perhaps more importantly, bearing in mind that the argument now made is one of latent duplicity, nor did the appellant make any complaint once the evidence emerged as to the gap in the payments, and as to the fact and content of Mr Komninos' 1 March 2016 conversation with the appellant. Whilst not necessarily fatal to the point now raised on appeal, the lack of any complaint at trial tends to support our conclusion that there was no unfairness or difficulty for the appellant in the matter being run on the basis that Count 4 constituted a single offence rather than two offences.[51]

131 For the reasons given, we do not accept that Count 4 was bad for duplicity.

Inadequate reasons and reasoning

132 The appellant contends that the trial judge's reasons,[52] and reasoning,[53] were inadequate in various respects. In so contending, the appellant focuses upon five aspects of the judge's reasons:

(i) the relevance of the Warren agreement to the appellant's liability to pay for development costs prior to the date of that agreement (7 January 2016), and hence to the falsity of the representation the subject of Count 3;[54]

(ii) the circumstances in which Mr Komninos came to pay the $17,000 the subject of Count 3, rather than the initially agreed $15,000;[55]

(iii) the fact that Mr Komninos was shown a copy of the Warren agreement as part of his due diligence, and hence ought to have been aware of the clause that provided that the appellant had no responsibility to pay development costs prior to making the payments the subject of Count 4;[56]

(iv) Mr Komninos' references in his evidence in support of Count 4 to a "side

[51] *R v Hamzy* (1994) 74 A Crim R 341 at 348-349 (Hunt CJ at CL, Abadee and Simpson JJ agreeing).
[52] Appeal Ground 4.
[53] Appeal Ground 5.
[54] Appeal Grounds 4.1 and 5.1.
[55] Appeal Ground 4.2.
[56] Appeal Grounds 4.3 and 4.4.

deal", being the possibility of acquiring a unit or apartment in the completed development at a discounted price;[57] and

(v) the relevance to the finding of dishonesty in respect of Counts 3 and 4 of the fact that Mr Papagiannis was not present when the amendments to the option price were made.[58]

133 The appellant complains that the trial judge's reasons in relation to each of these topics are inadequate. In respect of topics (i) and (v), he makes an alternative submission to the effect that the judge's reasoning is inadequate.

134 While they are well known, it is useful to commence by setting out the basic principles governing the adequacy of reasons, as well as those governing the quite separate complaint of inadequate reasoning.

135 In a trial by judge alone, the judge has an obligation to provide adequate reasons. As the High Court explained in *Fleming v The Queen*,[59] this requires more than "a bare statement of the principles of law that the judge has applied and the findings of fact that the judge has made. Rather, there must be exposed the reasoning process linking them and justifying the latter and, ultimately, the verdict that is reached."

136 The precise content of the obligation to give adequate reasons in a particular case will depend very much upon the forensic issues in that case, and the way in which the case has been run.[60] As Kiefel CJ, Keane and Edelman JJ observed in *DL v The Queen*:[61]

> *Not every failure to resolve a dispute will render reasons for decision inadequate to justify a verdict. At one extreme, reasons for decision will not be inadequate merely because they fail to address an irrelevant dispute or one which is peripheral to the real issues. Nor will they be inadequate merely because they fail to undertake "a minute explanation of every step in the reasoning process that leads to the judge's conclusion". At the other extreme, reasons will often be inadequate if the trial judge fails to explain his or her conclusion on a significant factual or evidential dispute that is a necessary step to the final conclusion. In between these extremes, the adequacy of reasons will depend upon an assessment of the issues in the case, including the extent to which they were relied upon by counsel, their bearing upon the elements of the offence, and their significance to the course of the trial.*

137 Further, the adequacy of the trial judge's reasons must be assessed by reference to his or her reasons as a whole.[62]

[57] Appeal Ground 4.5.
[58] Appeal Grounds 4.8, 4.9, 4.10, 5.3, 5.4 and 5.5.
[59] *Fleming v The Queen* (1998) 197 CLR 250 at [28] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).
[60] *Boyle (a pseudonym) v The Queen* [2022] SASCA 50 at [118] (Livesey P, Lovell and Bleby JJA); *JGS v The Queen* [2020] SASCFC 48 at [201] (Lovell J, Peek and Bampton JJ agreeing).
[61] *DL v The Queen* (2018) 266 CLR 1 at [33] (Kiefel CJ, Keane and Edelman JJ) (omitting citations).
[62] *Boyle (a pseudonym) v The Queen* [2022] SASCA 50 at [119] (Livesey P, Lovell and Bleby JJA); *JGS v The Queen* [2020] SASCFC 48 at [201] (Lovell J, Peek and Bampton JJ agreeing).

138 A complaint of inadequate reasoning, as opposed to reasons, is essentially a complaint that the trial judge's reasons do not support the verdict returned. Kourakis CJ explained the distinction between inadequate reasons and inadequate reasoning in *R v Sexton*:[63]

> *The former [inadequate reasons] is a complaint that it is not possible to discern how the judge rationally arrive arrived at the determinative conclusions, and the latter [inadequate reasoning] is a complaint, in an appeal against conviction, that the reasons and intermediate findings of fact do not support a finding of guilt beyond reasonable doubt. There is an understandable tendency to slip from a complaint that the reasons are inadequate to a complaint that the Judge's reasoning, although apparent, does not rationally support their ultimate finding of fact and therefore the verdict. In the context of a criminal appeal against conviction pursuant to s 353 of the CLCA, the latter complaint may be an appeal on the ground that the verdict was unreasonable or not supported by the evidence, in which case it will result in an acquittal. Alternatively it may be an appeal on the ground that there has been a miscarriage of justice because the reasoning actually employed does not support the conviction even though there was another rational basis on which guilt might have been proved on the evidence. In such a case, there will ordinarily be an order for a retrial. These grounds might be made good, or shown to be unfounded, by reference to matters of evidence or law which are not dealt with in the judge's reasons.*

Liability to pay for development costs

139 An issue in respect of Count 3 was whether the appellant incurred any costs associated with the development. This was relevant to the falsity of the representation relied upon for that count.

140 The appellant complains that in concluding that the appellant did not have any responsibility for meeting development costs the trial judge relied upon the provisions of the Warren agreement to that effect. In circumstances where that agreement was dated 7 January 2016, and the payments the subject of Count 3 were made in November 2015, the appellant complains that the judge failed to provide adequate reasons for her reliance upon that agreement. In the alternative, he contends that the judge's reasoning was inadequate.

141 In order to address these complaints, it is necessary to examine the judge's reasoning in relation to the Warren agreement, both generally, and in the context of Count 3.

142 As explained earlier in these reasons, in a general section of her Honour's reasons, she addressed the appellant's entry into the Warren agreement on 7 January 2016.[64] Her Honour summarised the clauses of that agreement relating to the development costs to be incurred, noting that clause 2F provided that the appellant was not liable to pay money for the development (other than for monies spent to date on Professional Services). The judge concluded her summary of the provisions of the Warren agreement by noting that the payments that were the

[63] *R v Sexton* [2018] SASCFC 28 at [177] (Kourakis CJ, Peek and Nicholson JJ agreeing); see also *JGS v The Queen* [2020] SASCFC 48 at [208] (Lovell J, Peek and Bampton JJ agreeing).

[64] Reasons at [432]ff.

subject of Counts 2, 4, 6 and 7 were all made after execution of the Warren agreement.[65] Having omitted Count 3 from this list, it is apparent that the judge appreciated that the terms of the Warren agreement did not directly govern the position as at the time of the payments the subject of Count 3.

143 Importantly, as explained earlier, the judge then proceeded to summarise, and make findings in relation to, the evidence as to the roles of the various parties involved in the development. This included the evidence of Mr Warren and Mr Papagiannis. Having summarised this evidence, the judge concluded that the parties were effectively bearing their own costs; that the appellant did not have any obligation to pay for any of the costs incurred by Warren Design or MKRE; and that, given his limited role, the appellant's costs would have been confined to his time and energy, as well as some ancillary out of pocket costs. The relevant passage from the trial judge's reasons (at [447]-[451]) has been set out earlier in these reasons. Whilst the judge did not say so expressly, the effect of her Honour's findings was that the terms of the Warren agreement in relation to the payment of development costs essentially reflected the position that had existed between the parties prior to that agreement being signed.

144 Importantly, there was no evidence, or any positive defence case, that suggested that the position was otherwise. There was no evidence to suggest that there was some positive obligation on the part of the appellant to meet development costs; let alone that he in fact met any of those costs. In the circumstances, it was hardly surprising that the judge found (at [453] (quoted earlier)), that she was satisfied beyond reasonable doubt that the appellant did not incur any obligation to pay, or in fact pay, any development costs.

145 Turning to the trial judge's findings addressed specifically to Count 3, the judge again found that the appellant had no obligation or responsibility to pay for development costs. Her Honour said:

> *[564] Although some of the funds were withdrawn in cash by the accused, I refer to my findings as set forth in paragraphs 435, 438, 439 and 447 to 450 as to the accused's role in the development and the resulting expenses thus incurred by him in performing that role. Even if there was any responsibility for the accused to pay for project development costs, including architectural drawings, which there was not, I exclude as a reasonable possibility, that cash withdrawn by the accused was used to make such payments. This was a large commercial development. Any such expenses incurred and paid for would, by necessity, for taxation purposes, be properly documented and traceable.*

146 It can be seen that, in support of this finding, the judge referred back to paragraphs [435], [438], [439] and [447]-[450]. It is true that the first three of these cross-referenced paragraphs related to the judge's analysis of the Warren agreement, and the absence of any obligation on the appellant to pay development costs under the terms of that agreement. However, the reference back to paragraphs [447]-[450] was a reference back to her Honour's conclusion

[65] Reasons at [441].

in relation to her more general findings in relation to the roles of those involved in the development, and their understanding that each would bear their own costs. This conclusion covered the period during which the Count 3 payments were made.

147 Understood in this way, the trial judge adequately explained the basis for her conclusion that, at the time of the payments the subject of Count 3, the appellant did not have any obligation to pay development costs. Given the absence of any evidence, or positive defence case, to suggest otherwise, we do not think it was necessary for the judge to say any more than she did. Further, the judge's reasoning in this respect was sound.

148 To the extent that the judge relied upon the provisions of the Warren agreement in reaching this conclusion, it was merely by way of explaining that the provisions of that agreement did no more than give effect to the position that already existed between the parties. In that sense, the Warren agreement was of limited significance, but provided some contextual or circumstantial support for the conclusion that her Honour reached about the earlier period of time.

149 The complaint of inadequate reasons or reasoning in support of the conclusion that the appellant did not have any responsibility for paying development costs at the time of the payments the subject of Count 3 has not been made out.

150 For completeness, we would add that even if the complaint had been made out, it is difficult to see that it would have led to this Court interfering with the verdict on Count 3. As set out in the balance of paragraph [564] of the trial judge's reasons, her Honour went on to hold that "[e]ven if there was any responsibility for the accused to pay for project development costs … which there was not, we exclude as a reasonable possibility, that cash withdrawn by the accused was used to make such payments." This finding was not challenged and would have been sufficient to falsify the representation the subject of Count 3.

The $17,000 contribution

151 The appellant challenges the adequacy of the judge's reasons in relation to Count 3, focusing upon the circumstances in which Mr Komninos was found to have agreed to contribute $17,000 (as opposed to an earlier agreed $15,000).

152 It will be recalled that Mr Komninos gave evidence to the effect that he had a coffee shop conversation with the appellant in November 2015, and that subsequently, by email to the appellant dated 11 November 2015, he confirmed that he and his wife would contribute $15,000 to development costs. However, by two instalments made on 13 and 14 November 2015, Mr Komninos paid the appellant $17,000. The judge accepted the evidence of Mr Komninos, and found, that this change in the amount of the payment was the result of a further conversation between Mr Komninos and the appellant between the date of the email and the first payment.

153 The relevant passages from her Honour's reasons are as follows:

> *[548] Mr Komninos did not make any notes of [the coffee shop conversation]. However, after considering the proposal, Mr Komninos sent an email to the accused on 11 November 2015. I am satisfied that this email contained his response to the proposal he had discussed with the accused at the coffee shop, namely that Mr Kominos and his wife would contribute $15,000 'for the development approval costs' in return for the Contract Amount being increased to $1.45M.*
>
> *[549] ...*
>
> *[550] I accept the evidence of Mr Komninos that between sending the email on 11 November 2015, and transferring the first sum of $8,500 on 13 November 2015, he had a further, undocumented, telephone discussion with the accused, whereby the accused told him he would raise the Contract Amount to $1.45M, if the contribution made by the couple was increased to $17,000. I am satisfied that this contribution was made by the complainants in response to the accused having represented to them that the money was to be used 'for development approval costs' as described in the earlier email.*
>
> *[551] I accept the evidence of Mr Komninos, supported by the documentary evidence, that the accused subsequently increased the Contract Amount on the option agreement to $1,465,950. This evidences the accused's acceptance of the terms of the agreement, namely, that in exchange for Mr Komninos paying the accused $17,000 for development costs, the accused would increase the Contract Amount on the option agreement to $1.45M.*
>
> *[552] Although the terms of this agreement were not (otherwise) documented by Mr Komninos, there was no need for any further record of the agreement to be made having regard to the terms of the email of 11 November 2015, the fact of the subsequent transfer of $17,000 and the fact the option agreement was amended as promised by the accused.*

154 In his written submissions, the appellant summarised his complaint in respect of this passage of the judge's reasons in the following terms:

> *The Learned Trial Judge's reasons do not grapple with the obvious difficulty revealed by the evidence of Komninos in any adequate way. Her Honour finds that he is an honest witness, but this does not immunise his evidence from the criticism levelled at it by reason of his lack of memory ... True it is that there was an email documenting an agreement which provided some support for the claimed conversation at the coffee shop, but her Honour's reasons fail to engage with the significant difficulty posed by the fact that it did not document the relevant agreement. The issue of the recall of the witness as to the conversation which occurred following the sending of the email effectively remained unresolved but cloaked by reference to the email, bank transfer and option amendment. This matter was a matter which relevantly impacted the reliability of the witness's evidence on this topic and perhaps more generally. The reasoning of the Learned Trial Judge ought to have been exposed in a manner which allows the reader to understanding the manner in which the issue was resolved.*

155 In our view, the trial judge's reasons in respect of the $17,000 contribution are adequate, indeed clear. While Mr Komninos was not able to recall the detail of the conversation he had with the appellant between his 11 November 2015 email and the 13 November 2015 payment, we do not think this mattered. The judge was entitled to accept his evidence that, during this conversation, he agreed to increase his contribution to $17,000. This is what the judge did in paragraph [550]. Further, as the judge went on to explain in [552], there was no need for the agreement to contribute $17,000 to be recorded in writing. That was particularly so in circumstances where, as her Honour further reasoned, the conclusion that this was the sum Mr Komninos had agreed to pay was supported by the findings that he in fact paid this sum, and that the purchase price in the option agreement was amended in the terms Mr Komninos said had been agreed.

156 In the circumstances, we are satisfied that the trial judge's reasons in relation to the quantum of the contribution were adequate, indeed clear. There was no need for the judge to elaborate upon the issue any further given that it was not suggested that the change from the contemplated sum of $15,000 to the sum of $17,000 was relevant from a causation perspective, or to the issue of dishonesty.

Mr Komninos' due diligence and consideration of the Warren agreement

157 The appellant complains that the trial judge's reasons do not adequately address the significance of Mr Komninos' due diligence, and consideration of the Warren agreement, prior to him making the payments the subject of Count 4.

158 At paragraph [578] of her reasons, within the section of those reasons addressing the verdict for Count 4, the trial judge mentioned the 28 January 2016 conversation between Mr Komninos and the appellant, during which Mr Komninos told the appellant that he was between jobs, but may be willing to 'invest' an amount in the development, subject to him undertaking appropriate due diligence, including seeing a copy of the Warren agreement.

159 The judge did not return to the issue of Mr Komninos' desire to undertake appropriate due diligence, or to see a copy of the Warren agreement, prior to reaching her verdict on Count 4. The appellant contends that the judge was required to address this issue further, arguing that the evidence revealed that Mr Komninos was shown the Warren agreement during a subsequent meeting with the appellant on 3 February 2016, and that having seen the agreement, he ought to have appreciated that clause 2F of the agreement provided that appellant had no obligation to meet development costs. The appellant contended that this was relevant to whether Mr Komninos was misled at all in relation to the use to be made of the funds he transferred to the appellant.

160 The difficulty with the appellant's argument is that it does not have adequate regard to the evidence on this issue, and the way in which it featured in the forensic contest between the parties.

161 Earlier in her reasons,[66] the trial judge set out Mr Komninos' evidence in relation to his 28 January 2016 conversation with the appellant in some detail. She quoted his evidence to the effect that he told the appellant that he wanted to do his due diligence, including seeing the Warrant agreement. Mr Komninos said he was told by the appellant that he could see the agreement, but could not take a copy of it, and that the appellant agreed to bring the agreement to their next meeting for Mr Komninos to have a look at it.

162 Turning to the 3 February 2016 meeting, the judge referred to Mr Komninos' evidence that the appellant brought the Warren agreement with him, and that Mr Komninos "flicked through the contract".[67]

163 The judge then addressed the detail of Mr Komninos' evidence as to the conversation that occurred on 3 February 2016, which included a discussion of the role of Warren Design, the prospect of them doing a larger development, and the likelihood of the development going ahead.

164 The judge did not elaborate upon this reference to Mr Komninos having "flicked through the contract." This is not surprising, given the limited evidence on the topic. The only reference in his evidence in chief to Mr Komninos having an opportunity to consider the Warren agreement was as follows:[68]

> 14 Did he bring the contract with Robert Warren.
>
> A He did.
>
> 15 Did you read it.
>
> A I flicked through it.

165 The cross-examination on the topic did not take the evidence much further:[69]

> 16 You saw the agreement that Mr Cakar had with Mr Warren.
>
> A I skimmed through the agreement when he came to my house and gave it to me.
>
> 17 You said that you were going to conduct due diligence. Did you conduct due diligence by skimming through the agreement between the developer and Mr Cakar.
>
> A I used the term 'due diligence' in my conversation with Illi as a reason for him to bring me – to show me the agreement and he did show me the agreement and I flicked through the agreement and I just had a quick look through it and that was it to be honest.

[66] Reasons at [263]-[265].
[67] Reasons at [266].
[68] T176.
[69] T209-210.

18 I suggest to you that the agreement makes clear that the developer is Mr Warren and Warren Design and he was also the architect and you would have known that.

A Sorry, can you just repeat that again?

19 I suggest that the agreement that you looked at makes clear that the architect and developer was Warren Designs.

A Yes.

20 So you knew that the developer was Warren Designs and that Mr Robert Warren was the man in charge of that.

A My understanding was that Robert Warren Designs were doing the architectural drawings, yes.

21 I am saying in conjunction with the architect Mr Robert Warren and Warren Designs was the developer.

A Yes, that was a joint venture was my understanding.

166 It is apparent from this passage that Mr Komninos' reference to due diligence was focused upon his desire to sight the Warren agreement – presumably to ensure it existed and was genuine – as opposed to familiarising himself with the detail of it. In any event, there was no cross-examination to suggest that Mr Komninos read clause 2F, or otherwise appreciated that the agreement provided that the appellant had no responsibility for development costs.

167 Bearing in mind that Mr Komninos' evidence was that he was not permitted to take a copy of the agreement with him, there was no basis in the evidence for suggesting that he had a proper opportunity to read the Warren agreement. Certainly there was no basis in the evidence for suggesting that he read, or appreciated the significance of, clause 2F of that agreement.

168 It is true that the defence written submissions included a submission that it was unreasonable that, having flicked through the Warren agreement, Mr Komninos was still prepared to provide the appellant with funds. However, given the state of the evidence, and the absence of any cross-examination that might support this submission, we do not consider that it was incumbent upon the trial judge to address the issue in any more detail than she did. Her reference to him having only "flicked through the contract" made it plain that she was proceeding on the basis that he did not see, or appreciate the significance of, clause 2F of the Warren agreement.

The apartment 'side deal'

169 Reference has already been made to Mr Komninos' evidence to the effect that he and the appellant discussed the possibility of a deal whereby he would acquire a unit or apartment in the development at a discounted price. He referred to this possibility in his evidence of his 3 February and 1 March 2016

conversations with the appellant. The appellant contends that the possibility of this deal was a matter that was relevant, for example, to the issue of causation, and that the judge's reasons, in not addressing the issue, were inadequate.

170 Once again, it is necessary to consider the issue in the context of the evidence at trial, and the forensic contest between the parties.

171 The evidence in relation to the possibility of a deal to acquire an apartment was relatively fleeting. By reference to the notes he took at the time, Mr Komninos gave evidence that, during his conversation with the appellant on 3 February 2016, in which they discussed the development and the appellant made the representation the subject of Count 4, the appellant indicated that he could arrange Mr Komninos an apartment in the development at cost. Mr Komninos said " … and my last dot point is a side deal which was in reference to me getting an apartment in the project once the development was complete".[70] Further, when giving evidence about the 1 March 2016 conversation during which the appellant reassured Mr Komninos that the development was going ahead, he again made reference to the appellant's suggestion that he could arrange him a discounted unit or apartment in the development.[71]

172 There was no cross-examination on the issue of the apartment. Nor did it feature in the defence case or submissions.

173 In the circumstances, the argument now advanced on appeal as to the potential relevance of the issue to the causation analysis does not provide a proper basis for impugning the adequacy of the trial judge's reasons. As the authorities referred to earlier make plain, the judge is not required to address every issue which the parties' submissions raise, let alone all of those that arise merely as a matter of potential significance on the evidence but do not feature in the parties' submissions. The adequacy of the trial judge's reasons must be assessed by reference to the forensic contest at trial, with the content of that obligation being focused upon addressing the issues at the heart of that forensic contest; and not those either at the periphery of, or not featuring at all in, that forensic contest.

The absence of Mr Papagiannis

174 We have earlier set out the key passages from the trial judge's reasons addressing her conclusions that the appellant's conduct was dishonest in respect of both Count 3 (at [567]) and Count 4 (at [599]-[600]). In both passages, the trial judge commenced by finding that she was satisfied beyond reasonable doubt that the accused knew the monies advanced to him would not be used by him to meet development costs. She was satisfied of this both because the appellant knew he had no obligation to meet those costs, and because he knew he needed the funds to meet his own living expenses. However, in both passages, the judge went on to add that the fact that Mr Papagiannis was not present at the time the

[70] T178.
[71] T182.

option agreement was amended, and that he was not informed of the same in order to enable him to draft an appropriate addendum to the associated sale contract, demonstrated that the appellant did not wish his conduct to be known by Mr Papagiannis, this being circumstantial evidence in support of the finding of dishonesty.

175 The appellant contends that the judge's reasons, and reasoning, as to the relevance of Mr Papagiannis' lack of involvement in the amendments to the option and sale agreements were inadequate.

176 We do not accept this contention. Read in the context of the trial judge's reasons as a whole, her reasons and reasoning on this issue were adequate.

177 The trial judge had earlier found that Mr Papagiannis was present for some of the conversations prior to the execution of the option agreement and associated sale contract, and was present at – and witnessed – the execution of those documents. The judge explained that whilst the appellant had responsibility for the option agreement, Mr Papagiannis and MKRE were responsible for drafting the associated sale agreement. This was consistent with the judge's description of the division of roles between the appellant, and Mr Papagiannis and MKRE. It was also consistent with the interest Mr Papagiannis had in the development, and in particular the sale of properties necessary for that development to proceed.

178 However, as the trial judge also found, Mr Papagiannis did not play any equivalent role in either the discussions leading up to the amendments to the purchase price in the option agreement and associated sales contract, or the amending of those documents. Indeed, he was not informed of those discussions or the amendments.

179 In the circumstances, it was appropriate for the trial judge to contrast Mr Papagiannis' knowledge of, and involvement in, the initial arrangements, with Mr Papagiannis' lack of knowledge of, or involvement in, the subsequent amendments to those arrangements. Even without there being any obligation on the part of the appellant to inform or involve Mr Papagiannis, the contrast remained a relevant piece of circumstantial evidence. It was capable of supporting an inference that the appellant did not inform or involve Mr Papagiannis because he apprehended that Mr Papagiannis would not approve of the amendments to the initial arrangements; and was hence capable of supporting an inference of dishonesty on the part of the appellant.

180 Properly understood, the judge adequately explained the use she made of Mr Papagiannis' lack of involvement in the amendments to the initial arrangements, and the use she made of the evidence involved permissible circumstantial reasoning. The complaints of inadequacy in the judge's reasons and reasoning have not been made out.

Conclusion

181 In summary, having had the occasion to read most of the evidence and submissions at trial, it is apparent that both parties chose to contest the case at a relatively high or general level. Focusing on Counts 3 and 4, the prosecution case was that the appellant made a number of statements constituting the one representation as to the use to which the payments made would be put, and that this caused the appellant to obtain two financial advantages of $17,000 and $70,000 (each of which was effected through multiple electronic fund transfers). By and large, the defence chose to meet this case at an equally general level, arguing that the representation had not been proved and that the cause of the payments was not the representation alleged as to the purpose for which the monies would be used, but rather a desire on the part of the complainant to obtain an uplift in the purchase price in his option and sale agreements. Having conducted the case in this way, there is a difficulty in arguing grounds of appeal that rely, for the first time, upon a more detailed consideration of some isolated aspects of the evidence in what was a relatively long and complicated trial.

182 For the reasons set out, we grant permission to appeal on the grounds argued before this Court, but dismiss the appeal.